Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

In The

United States Supreme Court

October Term, 1995

ALEXANDER SPIEGEL, ELIZABETH SPIEGEL,
RUDY SPIEGEL and ANDREW SPIEGEL,
Petitioners,

-against-

ISRAEL FRED GOODMAN, LOTTIE GOODMAN,
ESTHER HOSCHANDER and AVIVA HOSCHANDE
d/b/a GOODMAN & HOSCHANDER, MOSES TEPFER
d/b/a RELIABLE MANAGEMENT CO., NATHAN SCHORR,
JANE GARFIELD and 50TH STREET ASSOCIATES,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE NEW YORK SUPREME COURT
APPELLATE DIVISION, SECOND DEPARTMENT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, in order to prevent arbitrary and capricious rulings, due process of law requires that a state trial or state appellate court explain the amount of counsel fees it awards a prevailing plaintiff, when the unexplained amount of the fee bears no relationship to the award sought or to the undisputed time, effort, and skill expended by plaintiffs' counsel over nine years of litigation?

2. Whether in this landlord-tenant case, and in light of state law precedent, the *sua sponte* dismissal by a state appellate court of petitioner's claim they be restored to the apartment from which they were wrongfully evicted, which dismissal was made without giving petitioners an opportunity to be heard in the issue, was not merely an error of state law, but a ruling so arbitrary and capricious as to deny petitioners due process of law?

3. Whether, in light of state law precedent and the trial evidence, the state appellate court's striking of all the punitive damages awarded by the jury to the wrongfully evicted plaintiffs on the grounds there was no evidence to support the claim, was not merely an error of state law, but was so arbitrary and capricious as to deny petitioners due process of law?

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In The

United States Supreme Court

October Term, 1995

ALEXANDER SPIEGEL, ELIZABETH SPIEGEL,
RUDY SPIEGEL and ANDREW SPIEGEL,

Petitioners,

-against-

ISRAEL FRED GOODMAN, LOTTIE GOODMAN,
ESTHER HOSCHANDER and AVIVA HOSCHANDE
d/b/a GOODMAN & HOSCHANDER, MOSES TEPFER
d/b/a RELIABLE MANAGEMENT CO., NATHAN SCHORR,
JANE GARFIELD and 50TH STREET ASSOCIATES,

Respondents.

**PETITION FOR WRIT OF CERTIORARI
TO THE NEW YORK SUPREME COURT,
APPELLATE DIVISION, SECOND DEPARTMENT**

OPINIONS BELOW

The opinion of the Supreme Court of the State of New York, County of Kings, denying the motion to set aside the jury verdict appears in the appendix (Pet. App. A10). The opinion of the Appellate Division of the Supreme Court of the State of New York, Second Department, is reported at 204 App. Div.2d 430, 614 N.Y.S. 2d 179 (1994) (Pet. App. A1). The order of the New York Court of Appeals denying leave to appeal to that court is reported at 84 N.Y. 2d 806 (1994) (Pet. App. A4). The order of that same court denying the motion for reargument is not yet reported and appears in the Appendix (Pet. App. A5).

JURISDICTION

The decision and order of the Appellate Division of the Supreme Court of the State of New York, Second Department, was entered on May 9, 1994. The order of the New York Court of Appeals denying leave to appeal to that court was entered October 20, 1994. The order of the New York Court of Appeals denying reargument of the motion for leave to appeal to that court was entered on December 21, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISION INVOLVED

This case involves Amendment XIV, section 1, the United States Constitution. It is set forth in the Appendix.

STATEMENT OF THE CASE

In June 1989, following nine years of litigation, including a three week trial, a New York State jury awarded the plaintiffs-petitioners (hereinafter "the Petitioners") compensatory and punitive damages for their wrongful eviction from their home by the defendant landlords. Three arbitrary and capricious judicial rulings, however, two after the verdict, one before, marred the verdict and denied the Petitioners due process of law.

First, after the verdict, and pursuant to New York's Real Property Law §234, Petitioners applied to the trial judge for $73,792 in legal fees for nine years of litigation. The claim was fully documented with attorneys' time records, canceled checks showed the sum had actually been paid the attorneys, and the defendants did not dispute either the time spent by counsel nor the level of skill required over the years of litigation and the three week trial. Nevertheless, without explaining what, if anything, was inappropriate about the legal fees requested, the trial judge awarded only $27,500 in legal fees.

Second, although the record was filled with evidence that the defendants had acted recklessly or with malice in wrongfully evicting the Petitioners,[1] and although the trial court had correctly charged the jury with respect to New York's law on punitive damages and in a careful opinion had refused to vacate the jury award of punitive damages, (Pet. App. A17-A18), New York's Appellate Division set aside the punitive damages with the brief, conclusory remark that there was no showing of malice to sustain the punitive damages verdict. The ruling not only ignored the evidence before the trial jury, but it arbitrarily and capriciously ignored the settled law of New York that appellate courts cannot set aside a jury verdict on the grounds of insufficient evidence unless there was no rational basis for the verdict. At the same time, the Appellate Division affirmed *sub silentio* the trial court's arbitrary award of $27,500 in counsel fees. Because the state's highest court, the Court of Appeals, refused to review the matter, the decision of the Appellate Division is the final ruling in the matter.

---

[1] The record showed the Petitioners lived in their apartment without incident for six years, paying the rent the first of each month. Beginning in October 1979 the landlord filed three successive court petitions seeking Petitioners' eviction for nonpayment of the rent. Petitioners at all times asserted the proper rent had been paid. Each petition filed by the landlord alleged a different amount due for the monthly rent; the first two petitions were dismissed, the third ended in a default judgment and Petitioners' eviction. Petitioners argued to the jury that the evidence showed the landlord had misled the court by alleging in the third petition a rent it knew was not due; and that at the time of the judgment and eviction the defendants had checks from the Petitioners they knew exceeded the rent claimed in the third petition. The jury also knew one of the defendants had personally witnessed the eviction of the petitioner family in the rain and had done nothing to stop it. Finally, the jury also had before it the testimony of the defendants' managing agent whose purported justifications for the many nonpayment petitions and the eviction could only strengthen the view that the defendants had acted maliciously or with reckless disregard for the rights of the Petitioners-the basis for punitive damages in New York.

Third, two years before the verdict, while the matter was on an interlocutory appeal permitted by New York law, the same Appellate Division, citing "laches," struck the Petitioners' claim that they be restored to the premises from which they had been wrongfully evicted. Both sides had appealed a lower court ruling denying each side summary judgment. What makes the appellate ruling so striking is that the defendants had not pleaded the defense of laches in their answer nor had they raised it in their motion for summary judgment. Not only did this ruling arbitrarily ignore the settled New York law that laches cannot be considered for the first time on appeal, but the ruling was made without giving the Petitioners any opportunity to make a factual showing that laches did not exist-in short, because the matter first arose in the Appellate Division's decision, Petitioners had no opportunity to be heard on the matter. Because this was an interlocutory appeal and not a final judgment, the Court of Appeals refused to entertain a further appeal, and the Appellate Division's decision concluded the matter.

All three matters are preserved for review by this Court either because petitioner raised them in a timely manner on appeal, or because the state rulings were sprung on the Petitioners for the first time in a final appellate court ruling, so that this petition is the first opportunity the Petitioners have to challenge the arbitrary state action:

On appeal to the Appellate Division the Petitioners protested the arbitrary counsel fee award, noting it was not reasonable under New York's case law, and objected that the trial court "did not set forth any reasons" for the amount of the fee award, and that the trial court "should not have reduced the fee without specifically setting forth reasons for doing so." (App. Br. in Appellate Division 43). Petitioner's unsuccessful application for permission to appeal to the Court of Appeals similarly protested the arbitrary trial court ruling: it had not set forth "any reasons" for its ruling and it should not have reduced the fee "without specifically setting forth its reasons for

doing so." Petitioners' further unsuccessful application seeking reargument of the motion for leave to appeal to the Court of Appeals reiterated that because an unreasonable trial court award of counsel fees made "without explanation" was affirmed *sub silentio*, petitioner's had been denied a "reasoned basis" for a decision. Thus, the arbitrary and capricious nature of the ruling was protested throughout the appellate process by the Petitioners.

Of course, the Appellate Division's elimination of the punitive damages on the grounds of insufficient evidence, and its *sua sponte* application of the laches defense on appeal could not be protested "in advance of the event." *Great Northern Railway Co, v. Sunburst Oil Refining Co.*, 287 U.S. 358, 362 (1932). The basis for these rulings "supply a new and unexpected basis for a claim by the defeated party of the denial of a federal right," *Ibid.;* see also, *Brinkerhoff-Faris Trust Savings Co. v. Hill*, 281 U.S. 673, 678 (1930); *NAACP v. Alabama*, 357 U.S. 449, 457 (1958); *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964), and therefore the federal question is available for this Court's review. In addition, these rulings were protested in Petitioners' unsuccessful applications to be heard in the New York Court of Appeals. Their arbitrary nature is therefore suitable for review by this Court.

ARGUMENT

PETITIONERS' FOURTEENTH AMENDMENT DUE PROCESS RIGHTS WERE VIOLATED INASMUCH AS THE NEW YORK COURTS DID NOT MAKE MERE ERRONEOUS RULINGS OF LAW, BUT ARBITRARILY AND CAPRICIOUSLY, AND IN A REPEATED MANNER, IGNORED STATE LAW PRECEDENT AND RULED AGAINST PETITIONERS EITHER WITHOUT EXPLANATION OR WITHOUT GIVING THEM AN OPPORTUNITY TO BE HEARD.

It is well settled that the decisions of a state's judiciary are constrained by the Fourteenth Amendment's Due Process Clause, *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 680 (1930); *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226, 239, 241 (1897), and while federal courts will not intervene to correct a merely erroneous state court ruling, *Brinkerhoff-Faris Trust & Savings Co. v. Hill, supra* at 680; *American Railway Express Co. v. Kentucky*, 273 U.S. 269, 273 (1927), they will intervene where the state ruling "amounts to a mere arbitrary and capricious exercise of power," *American Railway Express Co. v. Kentucky*, 273 U . S . at 273, as when the ruling violates settled principles of law or is contrary to undisputed facts. *Hughes v. State of Washington*, 389 U.S. 290, 296 (1967)(Stewart, J. concurring); *Reynolds v. State of Georgia*, 640 F.2d 702, 705 (5th Cir. 1981); *Williams v. Tooke*, 108 F.2d 758, 759 (5th Cir. 1940), *cert. denied*, 311 U.S. 655 (1940) . Thus, while state courts are free to determine the adjective and substantive law of the state, in so doing they must accord the parties due process of law. *Brinkerhoff-Faris Trust & Savings Co. v. Hill, supra* at 682.

In three respects the New York courts crossed the line separating the merely erroneous from the arbitrary and capricious. First, without explanation the trial court awarded only $27,500 of $73,792 requested for counsel fees, a result upheld *sub silentio* by the state appellate court. This is not a case in which the state court ruled Petitioners are not entitled to any counsel fees. Here the state court agreed Petitioners were entitled to counsel fees, and while it heard absolutely no evidence questioning counsel's time records, skill, or hourly fee, it selected $27,500—or about one-third the request—as the counsel fee award. It is difficult to imagine a ruling more arbitrary and capricious than one which simply plucks a number out of the air and makes that the court's ruling.

Due process does not require that every frivolous claim be addressed in writing by a court. But Petitioners' claim for counsel fees, as the trial court found, was not frivolous. Due process was therefore violated when the meritorious claim was then resolved in a totally arbitrary and capricious manner-a sheer exercise of power.

No more comforting from a due process perspective were the state appellate court's arbitrary disposition of the jury award of punitive damages, and the Petitioners' claim for restoration to the premises. Under settled New York law before the Appellate Division can vacate a jury verdict on the basis of insufficient evidence,

> "[i]t is necessary to first conclude that there is simply no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury on the basis of the evidence presented at trial....[I]n any case in which it can be said that the evidence is such that it would not be utterly irrational for a jury to reach the result it has determined upon, and thus a valid question of fact does

> exist, the court may not conclude that the verdict is as a matter of law not supported by the evidence." *Cohen v. Hallmark Cards, Inc.*, 45 N.Y.2d 493, 499, 382 N.E.2d 1145 1978).

As the trial court ruled, and as even a brief summary of the evidence discloses, *supra* p. 3 n.1, the jury's verdict awarding punitive damages is grounded in the evidence and New York law and is hardly "utterly irrational." Yet by fiat the Appellate Division announced without discussion there is "no showing" of malice to support punitive damages and reversed the jury award. This is not merely erroneous. In light of the state law, and the facts before the jury, it is arbitrary and capricious and therefore violative of the state appellate court's duty to afford litigants due process of law.

Even more egregious was the Appellate Division's dismissal of the Petitioners' claim for restoration to the premises on grounds of "laches" during an earlier interlocutory appeal. Laches was never pleaded in the defendants' answer, and was not raised in the defendants' motion for summary judgment which the Appellate Division had under consideration on appeal. New York law does not permit the defense of laches to be considered for the first time on appeal, *Szigyarto v. Szigyarto*, 64 N.Y.2d 275, 280, 475 N.E.2d 772 (1985); *Pastore v. Zlatniski*, 122 App. Div.2d 840, 841, 505 N.Y.S.2d 710 (2nd Dept. 1983); *Brown v. Lockwood*, 76 App. Div.2d 721, 729, 432 N.Y.S.2d 186 (2nd Dept. 1980), but even more importantly, if due process of law in its "primary sense" means the opportunity to be heard, *Brinkerhoff-Faris Trust Savings Co. v. Hill*, 281 U.S. at 681, then the New York appellate court denied Petitioners due process. Under New York law a claim of laches requires consideration of several factors including the length of the delay, the reasons for the delay, and detrimental reliance, *Weiss v. Mayflower Doughnut Corp.*, 1 N.Y.2d 310, 152 N.Y.S.2d 471, 135 N.E.2d 208 (1956), but the Appellate Division never afforded the Petitioners the opportunity to be heard on these factual issues

because the matter first arose in the appellate court's decision. This is not merely an error of law. Because this is a state case only this Court, and not a federal district court, can review the matter. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983).

This Court has, of course, devoted enormous time and effort to adjudicating the process which must be accorded persons under the Fourteenth Amendment by state correction departments, social welfare agencies, and the like. But outside of criminal trials, little attention has been focused on the procedural due process which state courts, and particularly state appellate courts, must accord the litigants before them. The issue is of importance not only to the Petitioners but to the thousands and thousands of state court litigants who look to their respect state courts for reasoned decisions, not arbitrary and capricious exercises of governmental power. The petition should be granted to illuminate the process which is due litigants before state courts rule against them.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Michael G. Wolfson
Norman A. Olch

APPENDICES

BEST AVAILABLE COPY

APPENDIX A—DECISION AND ORDER OF APPELLATE DIVISION OF MAY 9, 1994

Argued-April 15, 1994

VINCENT R. BALLETTA, JR., J.P.
JOHN COPERTINO
EDWARD J. HART
GABRIEL M. KRAUSMAN, JJ.

92-00395

Alexander Spiegel. et al.,

Appellants-Respondents,

v

Israel Fred Goodman, et al.,

Respondents-Appellants.

DECISION & ORDER

Harman, Ule. Rose & Ratner. New York, N.Y. (Jacques F. Rose of counsel). for appellants-respondents.

Jaroslawicz & Jaros, New York, N.Y. (David Jaroslawicz of counsel), for respondents-appellants.

In action, *inter alia*, to recover damages for wrongful eviction and abuse of process. (1) the plaintiffs appeal, as limited by their brief, from stated portions of a judgment of the Supreme Court, Kings County (Dowd, J.) dated October 17, 1991, which. *inter alia*. awarded them only $750 in alternative living accommodations, and vacated the award of punitive damages to Rudy Spiegel and Andrew Spiegel, and (2) the defendants cross-appeal from so much of the same judgment as found in favor of the plaintiffs and against them.

ORDERED that the judgment is modified, by deleting the provisions thereof which granted the plaintiffs Alexander Spiegel and Elizabeth Spiegel punitive damages; as so modified, the judgment is affirmed, without costs or disbursements.

Punitive damages should only be awarded when there is a showing that a defendant's action are heinous or reprehensible (*see, Lyke v Anderson*, 147 AD2d 18). In the instant case, there was no showing of malice on the part of the defendants in the procurement of the invalid warrant of eviction; thus, a basis for awarding punitive damages was not established (*see, Long Is. Airports Limousine Serv. Corp. v Northwest Airlines*, 124 AD2d 711; *Brandt v de Kosenko*, 57 Misc 2d 574).

We have reviewed the parties' remaining contentions and find them to be without merit.

BALLETTA, J.P., COPERTINO, HART AND KRAUSMAN, JJ., concur.

ENTER:
Martin H. Brownstein
Clerk

May 9, 1994

APPENDIX B—ORDER OF APPELLATE DIVISION DENYING REARGUMENT AND LEAVE TO APPEAL TO COURT OF APPEALS

VINCENT R. BALLADE, JR., J.P.
JOHN COPERTINO
EDWARD J. HART
GABRIEL M. KRAUSMAN, JJ.

92-00395

Alexander Spiegel. et al.,

Appellants-Respondents,

v

Israel Fred Goodman, et al.,

Respondents-Appellants.

DECISION & ORDER ON MOTION

Motion by the appellants-respondents for reargument of an appeal from a judgment of the Supreme Court, Kings County, dated October 17, 1991, which was determined by decision and order of this court dated May 9, 1994, or, in the alternative, for leave to appeal to the Court of Appeals from the decision and order of this court.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied, with $100 costs.

BALLETTA, J.P., COPERTINO, HART and KRAUSMAN, JJ., concur.

ENTER:
Martin H. Brownstein
Clerk

APPENDIX C—ORDER OF NEW YORK COURT OF APPEALS DENYING LEAVE TO APPEAL

STATE OF NEW YORK,

Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twentieth day of October 1994

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

2-14 Mo. No. 1180

Alexander Spiegel, et al.,

Appellants,

v.

Israel Fred Goodman, et al.,

Respondents

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

s/Donald M. Sheraw
Donald M. Sheraw
Clerk of the Court

APPENDIX D—ORDER OF NEW YORK COURT OF APPEALS DENYING REARGUMENT OF MOTION FOR LEAVE TO APPEAL

STATE OF NEW YORK

Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-first day of December 1994

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

Mo. No. 1489

Alexander Spiegel, et al.,

Appellants,

v.

Israel Fred Goodman, et al.,

Respondents

A motion for reargument of motion for leave to appeal to the Court of Appeals in the above cause been heretofore made upon the part of the appellants herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

s/Donald M. Sheraw
Donald M. Sheraw
Clerk of the Court

APPENDIX E—DECISION AND ORDER OF APPELLATE DIVISION OF MAY 11, 1987

Supreme Court of the State of New York

APPELLATE DIVISION—SECOND DEPARTMENT

Argued - February 2, 1987

GUY J. MANGANO, J.P.
WILLIAM C. THOMPSON
RICHARD A. BROWN
GERALDINE T. EIBER, JJ.

3448E

Alexander Spiegel, et al.,
Appellants-Respondents,

v

Israel Fred Goodman, et at., etc.,
Respondents-Appellants

DECISION & ORDER

Norman A. Olch, New York, N.Y., for appellants-respondents.

Tepfer & Tepfer (Schneinder & Tratner, New York, N.Y. [Howard Schneider and Louis Tratner] of counsel), for respondents-appellants.

In an action, *inter alia,* to recover damages for wrongful eviction and abuse of process, (1) the plaintiffs appeal from so much of an order of the Supreme Court, Kings County (Shaw, J.), dated June 23, 1986, as denied their cross motion for partial summary judgment

on the issue of the defendants' liability for wrongful eviction, and (2) the defendants cross-appeal from so much of the same order as denied their motion for summary judgment dismissing the complaint.

ORDERED that the order is modified, on the law, by deleting the provision thereof denying the defendants' motion for summary judgment, and substituting therefor a provision granting the defendants' motion to the extent that the plaintiffs' demand to be restored to possession of the subject premises is dismissed, and the motion is otherwise denied; as so modified, the order is affirmed, without costs or disbursements.

With respect to the issue of whether the plaintiffs were wrongfully evicted from the subject premises by the defendants and whether they are entitled to recover damages as a result thereof, triable issues of fact exist concerning the circumstances surrounding the plaintiffs' eviction, which preclude an award of complete summary relief to either party.

However, the plaintiffs are precluded from litigating the issue of their entitlement of possession of the premisses by virtue of the doctrine of laches.

MANGANO, J.P., THOMPSON, BROWN and EIBER, JJ., concur.

MARTIN H. BROWNSTEIN
Clerk

APPENDIX F—COURT OF APPEALS ORDER DENYING LEAVE TO APPEAL JANUARY 7, 1988

STATE OF NEW YORK

Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the seventh day of January A.D. 1988

Present, HON. SOL WACHTLER. *Chief Judge. presiding.*

2-14 Mo. No. 1297

Alexander Spiegel, et al.,

Appellants,

vs.

Israel Fred Goodman, et al., & c.,

Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDER, that the said motion be and the same hereby is dismissed upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution.

s/Donald M. Sheraw
Donald M. Sheraw
Clerk of the Court

APPENDIX G—CONSTITUTION OF THE UNITED STATES

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, of property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX H—DECISION OF TRIAL COURT DENYING DEFENDANT'S MOTION TO SET ASIDE THE VERDICT

Supreme Court of the State of New York

At a IAS Term, Part 18 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Brooklyn, City and State of New York, on the 27th day of OCTOBER, 1989

PRESENT: HON. JOSEPH J. DOWD, Justice

ALEXANDER SPIEGEL, ELIZABETH SPIEGEL, RUDY SPIEGEL and ANDREW SPIEGEL,

Plaintiffs,

against

ISRAEL FRED GOODMAN, LOTTIE GOODMAN, ESTHER HOSCHANDER and AVIVA HOSCHANDER d/b/a GOODMAN & HOSCHANDER, MOSES TEPFER d/b/a RELIABLE MANAGEMENT CO., NATHAN SCHOOR, JANE GARFIELD and 50th ASSOCIATES,

Defendants

Index No. 21002/80
Cal. No.

The following papers numbered 1 to ___ read on this motion:

Papers Numbered

Notice of Motion-Order to Show Cause and Affidavits (Affirmations) Annexed

Answering Affidavit (Affirmation)

Reply Affidavit (Affirmation)

Affidavit (Affirmation)

Pleadings-Exhibits

Stipulations-Minutes

Filed Papers

This is a motion by defendant MOSES TEPFER for an order setting aside the verdict rendered against him and directing judgment be entered in his favor as a matter of law or in the, alternative, ordering a new trial on the ground that the verdict is contrary to the weight of the evidence, and a cross-motion by defendants ISRAEL FRED GOODMAN, LOTTIE GOODMAN, ESTHER HOSCHANDER and AVIVA HOSCHANDER d/b/a GOODMAN & HOSCHANDER for an order setting aside the verdict in its entirety rendered in favor of plaintiffs on the ground that it is against the weight of the evidence; setting aside any award for emotional distress to ALEXANDER SPIEGEL and ELIZABETH SPIEGEL; setting aside the award of interest from 1979; and setting aside the award for punitive damages, all on the ground that there is no basis for these awards and granting a new trial on the ground that there were evidentiary errors during trial and the plaintiffs' attorney's summation was inflammatory and prejudicial. The basis for this action is a claim for wrongful eviction. The motion and cross-motion essentially seek the same relief with the exception that defendant TEPFER's motion includes a contention that the wrongful eviction cause of action against him should have been dismissed as a matter of law based on the fact that

he acted as an agent of a disclosed principal in the transaction which resulted in the plaintiffs eviction and therefore, could not be held liable. (*SAVONY RECORD CO. v CARDINAL EXPORT CORP.*, 15 NY2d 1).

In deciding a motion to set aside a jury verdict, the court must review the evidence in the light most favorable to the successful party (*Matter of KORNBLUM METALS CO. v INTSEL CORP.*, 38 NY2d 376, 379). For a court to conclude as a matter of law that a jury verdict is not supported by sufficient evidence requires a harsh assessment in that the court must first conclude that there is simply no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury on the evidence presented at trial. (*COHEN v HALLMARK CARDS*, 45 NY2d 493,499).

The theory presented to the jury by the plaintiffs was that defendant TEPFER was instrumental in bringing the eviction proceedings against the plaintiffs and had personal knowledge of the fact that the rent demanded from the plaintiffs was not in accordance with the law governing the type of apartment the plaintiffs had rented and that the landlord had failed to offer the tenants a written lease renewal.

With regard to the verdict against defendant TEPFER for his culpable conduct in pursuing the eviction proceedings, the Court, using the standard cited hereinabove, cannot say that the evidence presented was inadequate, as a matter of law, to support the finding of fact by this jury and that such a finding was beyond any valid line of reasoning or permissible inference that the jury may have used in reaching its verdict. The jury could have found that TEPFER went beyond the agency relationship because he had personal knowledge that the rent demanded was not legal based on the status of the dwelling as a Rent Stabilized apartment and was therefore, responsible for his own tortious conduct.

With regard to the cross-motion which seeks an order setting aside the verdict against the remaining defendants for their liability for the wrongful eviction of the plaintiffs, "the question whether a verdict is against the weight of the evidence involves what is in large part a discretionary balancing of many factors" (*COHEN v HALLMARK, supra*, p.499)

The defendants rely on a case which states that a landlord cannot be held liable for a wrongful eviction if such eviction is effectuated by a court order. (*CAMPBELL v MASLIN*, 91 AD2d 559). However, in the instant case this question was reviewed by the Appellate Division and summary judgment was not granted upon this basis, but instead, the Court found that with respect to the issue of whether plaintiffs were wrongfully evicted from the subject premises by the defendants and whether they are entitled to recover damages as a result thereof, triable issues of fact exist. Consequently, the question was properly presented as a question of fact for the jury to decide.

Based on the testimony of the parties with regard to whether this was a rent controlled or rent stabilized apartment, it must be inferred that the jury resolved the conflict in favor of the plaintiffs' contention that this was a rent stabilized apartment. Therefore, the landlords failure to offer a renewal lease, to demand an increase in rent without a renewal lease and when the demand was not complied with, to evict the plaintiffs, constituted a wrongful eviction.

The Unconsolidated Laws of the State of New York Sect.2204.1 state that the grounds for a lawful eviction are:

1. Failure to pay the rent to which the landlord is entitled;

2. Authorization for removal of or eviction by a court of competent jurisdiction.

The permissible inference that the jury could have and obviously did make was that a failure to pay the amount demanded for a rent increase without substantiating it by offering a renewal lease pursuant to the Rent Stabilization Law was not a failure to pay the rent to which the landlord was entitled but that it was justified under the circumstances. Since both factors must be true in order to establish a lawful eviction, the Court will not set aside the verdict for wrongful eviction.

The jury awarded compensatory damages for rent to the SPIEGELS as well as an award to compensate them for finding interim alternate living accommodations, and an award to ALEXANDER and ELIZABETH SPIEGEL for emotional distress. Interest for these damages was determined by the jury to be computed from June 3, 1980 the date of the eviction to present time. Finally, the jury awarded punitive damages.

Defendants challenge the jury's finding with regard to this date as well as the award for emotional damages and for punitive damages.

> CPLR 5001(b) states that "Interest shall be computed from the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred. Where such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date".

The defendants contend that 1) since the Appellate Division held that plaintiffs had lost their right to be restored to the premises through their own laches, they cannot recover damages or interest on those damages for additional rents they paid during the period

they were out of possession that was a result of their own delay and 2) that the date must be calculated from an intermediate date because plaintiffs are not entitled to interest on rent before it was paid or even due.

The Court agrees that the interest should be calculated from an intermediate date in order to arrive at a fair period of time for which interest will be calculated on the damages.

Accordingly, with regard to the date set by the jury, the Court sets aside this portion of the verdict and substitutes the intermediate date of 12-10-84, the date approximately half way between the date of eviction and the verdict.

The next item of damages challenged by the defendants is the amount awarded for emotional distress.

At trial, the plaintiffs testified how upset they were to find out that all their belongings had been put out on the street, having found out while they were at work that they had been evicted. The distress caused by the placement of their property on the curb in pouring rain and the humiliation and embarrassment they suffered in front of their neighbors because of the eviction. No medical testimony was offered.

The Court of Appeals has declared that, "Freedom from mental disturbance is now a protected interest in this State". (*FERRARA v GALLUCHIO*, 5 NY2d 16,21). It has also been said that, where a duty is owed, an emotional injury is compensable only when there is a direct, rather than consequential, result of the breach. (*KENNEDY v McKESSON CO.*, 58 NY2d 500,506).

The defendants cite two cases in support of this contention that plaintiffs have not sufficiently proved emotional distress as a consequence of their wrongful eviction.

In *KASACHKOFF v CITY OF NEW YORK*, 68 NY2d 654, the underlying action for defamation was dismissed, therefore the cause of action for emotional distress was also dismissed since there was insufficient proof that a duty to plaintiff was breached. In *GARRASI v MID-CITY DODGE, INC.*, 88 AD2d 760, a Fourth Department case for damages for breach of warranty and negligence simply held that "there can be no basis for recovery of emotional damage in this type of case" (p. 761).

In the instant action, the underlying claim which lays the basis for the claim for emotional distress has been sustained and the claim is one for an intentional tort not a negligence or breach of warranty claim as in *GARRASI, supra*. Recovery for emotional harm has been upheld in claims similar to the one at bar (*AARAON v WARD, 203 NY 351; PREISER v WILLANDT*, 48 App. Div. 569) where the defendants' actions show either intention to inflict mental distress or such intention can reasonably be inferred from acts done with recklessness showing utter indifference to such consequences.

The defendants also attack the award for emotional distress on the ground that plaintiffs offered no medical proof.

In *BATTALA v STATE OF NEW YORK*, 10 NY2d 237, 242, the Court of Appeals in an opinion by Hon. Justice Burke opined that, ..."the question of proof in individual situations should not be the arbitrary basis upon which to bar all actions.... In many instances, just as in impact cases, there will be no doubt as to the presence and extent of the damage and the fact that it was proximately caused by the defendant's negligence. In the difficult cases, we must look to the quality and genuineness of proof, and rely to an extent on the contemporary sophistication of the medical profession and the ability of the court and jury to weed out dishonest claims".

> "The rule of long standing in New York was stated by Judge Werner in *DOUGHERTY v MILLIKEN*, (163 N.Y. 527, 533) that where the conclusions to be drawn from the fact 'depends upon professional or scientific

> knowledge or skill not within the range of ordinary training or intelligence' recourse must be had to 'the knowledge of men whose experience or study enables them to speak with authority'". (*PEOPLE v KENNY*, 30 NY2d 154,157).

Whether or not someone might suffer distress as a result of being wrongfully evicted in the pouring rain in front of neighbors and friends is not a fact uniquely within an expert's knowledge. (*PEOPLE v PASCHALL*, 91 AD2d 645).

With regard to the award for emotional distress, the Court finds that, based on all the evidence presented, the common sense and good judgment of the jurors prevailed in light of their common knowledge and general experience, and was sufficient to make the award for damages for this cause of action.

Finally, the defendants challenge the award made by the jury for punitive damages on the ground that since there was insufficient evidence to make a finding of malicious prosecution, the requisite extreme conduct necessary to support an award for punitive damages was not proven by the plaintiffs.

The Court dismissed the claim for abuse of process and the jury denied the claim for malicious prosecution.

The standard used to justify the granting of punitive damages was set-forth in *WALKER v SHELDON*, 10 NY2d 401,404, "Punitive or exemplary damages have been allowed in cases where the wrong complained of is morally culpable, or is activated by evil and reprehensible motives, not only to punish the defendant but to deter him, as well as others who might otherwise be so prompted, from indulging in similar conduct in the future".

Consequently, using the standard set forth in COHEN, supra, the Court cannot conclude that there is no valid line of reasoning and permissible inference from which the jury could have reached the conclusion that a punitive damages award was applicable in this case.

Accordingly, this motion to set aside the verdict on punitive damages is denied.

The claim that the plaintiffs' attorney's summation was inflammatory and prejudicial the Court finds is without merit

ENTER.

s/J. Dowd
J.S.C.

APPENDIX I—DECISION OF TRIAL COURT AWARDING COUNSEL FEES

Supreme Court of the State of New York

At a IAS Term, Part 18 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Brooklyn, City and State of New York, on the 8th day of AUGUST , 1990

PRESENT: HON. JOSEPH J. DOWD, Justice

ALEXANDER SPIEGEL, ELIZABETH SPIEGEL, RUDY SPIEGEL and ANDREW SPIEGEL,

Plaintiffs,

-against-

ISRAEL FRED GOODMAN, LOTTIE GOODMAN, ESTHER HOSCHANDER and AVIVA HOSCHANDER d/b/a GOODMAN & HOSCHANDER, MOSES TEPFER d/b/a RELIABLE MANAGEMENT CO., NATHAN SCHOOR, JANE GARFIELD and 50th ASSOCIATES

Defendants.

Index No. 21002/80
Cal No.

The following papers numbered 1 to ___ read on this motion:

	Papers Numbered
Notice of Motion-Order to how Cause and Findings of Fact	1-2
Affidavits (Affirmations) Annexed Conclusions of Law	
Answering Affidavit (Affirmation)	
Reply Affidavit (Affirmation)	
Affidavit (Affirmation)	
Pleadings-Exhibits From hearing on fees,	1-6
from hearing on lease	1
Stipulations-Minutes from hearing on fees	3
Filed Papers	

A jury trial was held in this action for wrongful eviction and the jury found in favor of the plaintiffs.

Motions to set aside the verdict by defendants were substantially denied by order signed October 27, 1989.

As part of the action for wrongful eviction plaintiffs made a demand for attorneys fees in both defending the lower court action in the eviction proceedings and prosecuting their claim for wrongful eviction in this Court for damages, as well as for fees related to two appellate procedures from decisions rendered in the Civil Court and Supreme Court.

A hearing was held before the Court to determine the reasonable value of the attorney's fees. (*KUMBLE v WINDSOR PLAZA CO.*, 128 Ad2d 425; *WEINBERG v WEINBERG*, 95 AD2d 828).

In a separate hearing it was determined that the lease between the parties which was not admitted into evidence at the hearing on attorneys fees would be accepted by the Court as an additional exhibit for the limited purpose of determining whether a reciprocal right existed on behalf of the tenants to seek attorneys fees as a result

of the determination on the underlying trial that they were wrongfully evicted. This Court in an order dated August 2, 1990, found that such a right existed (REAL PROPERTY LAW §234; *PAPE v DOAR*, NYLJ 5/31/89 p.21, col 4, App. Term 1st Dept.).

The parties were requested to submit findings of fact and conclusions of law. After considerable delays both parties submitted their respective findings and conclusions to the Court.

After hearing and considering the evidence and the arguments of counsel, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On March 29, 1973 the plaintiff Alexander Spiegel, as tenant, and the defendants Goodman & Hoschander, as landlord, signed a lease for apartment 6D at 1335 50th Street, Brooklyn, New York. The term of the lease was from April 1, 1973 to September 30, 1974.

2. Said lease was the only written lease signed by the parties which was produced by either party.

3. Pursuant to paragraph 7 of said lease in the event of a default of rent or other covenants by the tenant, the tenant is obligated to pay the landlord the reasonable attorney's fees incurred by the landlord in bringing summary proceedings or otherwise re-entering or reletting the premises.

4. Under paragraph 21 of said lease the security deposit paid by the tenant can be applied by the landlord towards the "disbursements, attorney's fees, costs and expenses" that the landlord incurs in dispossessing the tenant who fails to comply with the covenants under the lease.

5. In March 1980 the defendant Goodman & Hoschander filed a petition for eviction in the Housing Court, Kings County, alleging a failure by the plaintiff to pay the rent. The plaintiff filed an answer denying the allegation.

6. On or about May 6, 1980 the plaintiff failed to appear in the Housing Court and a default judgment of eviction was entered.

7. On or about June 3, 1980 the plaintiffs were evicted from apartment 6D.

8. Following the eviction the plaintiffs moved by order to show cause to vacate the default judgment. The motion was denied by the Housing Court.

9. The plaintiffs also filed this wrongful eviction action against the defendants in this Court in 1980.

10. By order dated April 13, 1981 the Appellate Term vacated the default judgment and ordered a trial of the landlord's petition be held in the Housing Court.

11. By order dated August 7, 1984 the Housing Court denied the tenant's motion to place the case on the calendar for trial finding that the tenant was guilty of laches in delaying for more than one year.

12. By order dated May 3, 1985 the Appellate Term affirmed the order of lousing Court holding that all the issues raised could be litigated in the Supreme Court action brought by the tenant in which he is seeking damages for wrongful eviction.

13. After proceedings in this Court including discovery, motions for summary judgment and cross appeals to the Appellate Division from the denial of the motions for summary judgment,-the matter was tried before a jury in this Court in June 1989.

14. Jury selection was held on June 2, 1989, and the matter was tried from June 5 to June 20, 1989.

15. The jury rendered verdicts awarding plaintiffs compensatory damages, interest and punitive damages for wrongful eviction.

16. During the Housing Court proceeding the plaintiffs retained the law firm of Eagle & Fein and then attorney Mark C. Fresco. Subsequently, two other attorneys were consulted regarding the case.

17. In February 1982, plaintiffs retained attorney Norman A. Olch to represent them in the Housing Court at a rate of $100.00 per hour

18. The record in the Housing Court contains 892 pages.

19. In January 1983, Mr. Olch was retained to represent the plaintiffs in the Supreme Court action. The rate was $100.00 per hour until May 1, 1988 when it was increased to $125.00 per hour.

20. The attorneys did not submit daily time records for their work.

21. Bills and canceled checks were submitted for the payment to the first four attorneys retained in the total amount of $7,040.00.

22. The attorney, Norman A. Olch, submitted a tally of dates, nature of work, hours and fee from 2/26/82 through July 31, 1989 which included a total of 221 hours claimed for work in Housing Court and 435 hours claimed in connection with the Supreme Court proceeding.

Conclusions of Law

1. By operation of law the terms of the lease signed by the parties on March 29, 1973 remained in effect during the plaintiffs' tenancy until their eviction on June 3, 1980.

2. Pursuant to Real Property Law §234, and as part of the economic damages suffered by the plaintiffs for their wrongful eviction, plaintiffs are entitled to reasonable counsel fees.

3. This court can award counsel fees under §234 for the plaintiffs' defense against the eviction petition in the Housing Court because the Appellate Term's order of May 3, 1985 directed that "all" issues raised in the Housing Court case be litigated in the Supreme Court wrongful eviction action.

4. Considering the difficulty of the issues involved, the time expended, the skill and experience of the attorneys retained by the plaintiffs in Housing Court, the results obtained and the customary charges for similar services in the City of New York, I find that plaintiffs are entitled to $2,500.00 for attorneys fees in connection with the proceedings in Housing Court.

5. Considering the difficulty of the issues raised, the time expended, the skill and experience of plaintiffs' attorney, the results obtained and the customary charges for similar services in the City of New York, I find the plaintiffs are entitled to $25,000.00 for attorneys fees in connection with the proceedings in Supreme Court.

6. Because the plaintiffs have already paid their attorneys, I direct that the defendants pay the aforesaid counsel fees directly to the plaintiffs.

ENTER.

s/J. Dowd
J.S.C.